Filed 1/29/19 P. v. Olobayo-Aisony CA2/2
Opinion on transfer from Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ADEKUNLE OLOBAYO-AISONY, Defendant and Appellant.	B284951 (Los Angeles County Super. Ct. No. VA142640) **OPINION ON REMAND**

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Higa, Judge. Affirmed and remanded with directions.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie C. Brenan and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to an order by the California Supreme Court, we vacate our original opinion and issue this opinion instead. Our changes pertain only to Penal Code section 667, subdivision (a)(1),[1] as amended by Statutes 2018, Chapter 1013, and Senate Bill No. 1393 (2017-2018 Reg. Sess.) (SB 1393).

In an information filed by the Los Angeles County District Attorney's Office, defendant and appellant Adekunle Olobayo-Aisony was charged with criminal threats (§ 422, subd. (a); count 1), false imprisonment by violence (§ 236; count 2), misdemeanor battery (§ 243, subd. (e)(1); count 3), dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1); count 4), assault with intent to commit a felony (§ 220, subd. (a)(1); count 5), and attempted forcible rape (§§ 664/261, subd. (a)(2); count 6). The jury found defendant guilty of counts 2 and 4.[2] After waiving his right to trial on the prior felony conviction allegations, defendant admitted a prior serious felony conviction for purposes of section 667, subdivision (a)(1), and the "Three Strikes" Law. Defendant was sentenced to nine years in state prison, calculated as follows: the two-year middle term for count 4, doubled pursuant to the Three Strikes law, plus five years for the prior serious felony conviction (§ 667, subd. (a)(1)), and stayed the sentence on count 2. Defendant received 748 days of presentence custody credit.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The People dismissed count 3 before the case was submitted to the jury. The jury acquitted defendant of the remaining counts.

Defendant appeals, arguing that: (1) The trial court erred by refusing to admit a 76-page packet of text messages between defendant and the victim; (2) The trial court erroneously imposed the five-year enhancement because his conviction in count 4 was not a serious felony; and (3) Defendant's conviction for felony false imprisonment is not supported by substantial evidence.

This matter is remanded for resentencing. The trial court must be given the opportunity to exercise its newly authorized discretion to strike the enhancement imposed pursuant to section 667, subdivision (a)(1). In all other respects, we affirm the judgment.

FACTUAL BACKGROUND

Prosecution's Case

A. Prior uncharged act involving Tiana W. (Tiana)

On Tiana's 18th birthday in May 2002, she met with defendant, who she had recently met either on the bus or coming home from the bus. After he told her that he wanted to give her a birthday gift, she agreed to meet him later that day. That evening, she and defendant spent time together. They went underneath a bridge in a middle school to hang out.

Defendant began making sexual advances, which Tiana rebuked. Despite her reaction, defendant continued. He told her that no one would hear her if she screamed because they were in a secluded area. Defendant attempted to have sex with her. As he tried to pull her clothes down, Tiana pulled them back up. She "clench[ed]" her legs. After being unable to have sex with her from a standing position, defendant forced Tiana to the ground and had sex with her. At this point, Tiana had "shut down." When defendant finished, he told Tiana not to tell anyone. He promised to give her money. Tiana, however, told

her aunt and cousin about the assault when she arrived home. Her cousin called the police.[3]

B. Prior uncharged act involving Ashlee B. (Ashlee)

In 2002, Ashlee was a student at the University of Southern California. She worked in the student affairs office. One day, defendant saw Ashlee walking to work and approached her. He said that he was on his way to the track office on campus. He asked Ashlee to meet him later that day. After meeting again on campus, defendant suggested that they do something off campus. Defendant told her that he would give her money or buy her things. Although she had some "reservations" about meeting with him, Ashlee agreed to go shopping with defendant off campus. At some point while shopping, defendant asked if she would rather have money or clothes; she said that she wanted money.

Ashlee then drove defendant to a corner where he claimed that there was an ATM. She did not see the machine. Defendant got out of the vehicle and returned very quickly. The two then went to a Starbucks. At some point, Ashlee decided that she needed to take defendant home. While driving, he told her to pull the car over near a Laundromat. There were no cars in the parking lot adjacent to the Laundromat. Ashlee parked under a street light.

Ashlee asked defendant if his friend was going to pick him up. Defendant then touched her leg and leaned towards her. She told defendant to back up, and he did. Ashlee made a comment about feeling uncomfortable because the street light above the car

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[3] Defendant was later charged with and convicted of raping Tiana. This evidence was admitted pursuant to Evidence Code section 1108.

was flickering. Defendant asked her to move the car to a different spot, and she did. This spot was darker than the first.

When Ashlee turned the car off, defendant immediately grabbed the keys. Although she was nervous, she said, "'Oh stop. You're being silly . . . . Stop playing around." She wanted to run away, but she did not because she believed that defendant would catch her since he was on the track team. Defendant asked Ashlee if she knew what "'wasting someone'" meant. She understood it to sound like violence, and she was afraid. He then told her, "'you're not going anywhere tonight.'" Unable to think of anything to do to get out of the situation, Ashlee prayed. Defendant told her that nobody was in the area to hear her scream or help her if she ran. Suddenly, police arrived with their lights flashing. Ashlee grabbed the keys and asked the police for help.[4]

C. Charged act involving Kenyatta T. (Kenyatta)

Kenyatta began dating defendant in July 2016,[5] but the two had a falling out when he missed her birthday in early August. They agreed to go separate ways.

Despite the falling out, Kenyatta and defendant exchanged text messages until August 21, the date of the incident. Although she generally ignored defendant's phone calls, on August 20, Kenyatta answered a call and agreed to meet defendant at a restaurant the following day. They had not seen each other since

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[4] This evidence was admitted under Evidence Code section 1108. Defendant was not convicted for the incident with Ashlee. However, he was convicted of assault with intent to commit rape of an unknown victim in that same trial.

[5] Unless otherwise noted, all dates refer to 2016.

July 29. Defendant said that he wanted to give her a birthday present. Because defendant lived out of town, Kenyatta told him that if he wanted to see her, he needed a hotel room because he was not invited to her house.

Shortly after arriving at the restaurant, Kenyatta and defendant began to argue. Kenyatta said, "I'm done," and they both left the restaurant. After leaving defendant told Kenyatta that he wanted to give her the present. She told him to put it in her car, but he said that it was at his hotel. She agreed to go to the hotel to receive the gift.

Kenyatta met defendant at the hotel room. At some point, he pulled a dress and a bracelet out of a bag for her. She thanked him. He then pulled lubricant, a sex toy, and condoms from the bag. Kenyatta told defendant that she had to leave. She grabbed her purse and shoes as she was leaving but not the gifts. Defendant ran in front of the door, which was the only way out of the room. He latched the door.

Initially, defendant told Kenyatta to sit down, calm down, and stop screaming. Then, Kenyatta tried to move him out of the way. He grabbed her hand and throat and pushed her against the wall. She screamed "at the top of [her] lungs." Defendant told her to shut up, grabbed her shoulder, and pushed her into a chair by the door. He remained in front of the door.

Kenyatta asked defendant what he intended to do. He replied, "I want my money's worth." After Kenyatta asked what he meant by that, defendant explained that he paid for the room. She offered him $100, but defendant declined the money. He told Kenyatta that she was not leaving until they had sex. Kenyatta told him that she was not going to have sex with him. She then

asked if defendant intended to rape her, and he replied, "If I have to."

They remained in the same positions—defendant by the door and Kenyatta in the chair by the door—for about four hours. Some of that time was spent in silence, while at other times, defendant called Kenyatta names. Kenyatta tried to leave four different times, but she could not. The fourth time, defendant threatened to hurt her if she continued trying to push him. Kenyatta threatened to call 9-1-1. Defendant told her to "go ahead," but when she got up to use the phone, he grabbed it and threw it on the ground.

At some point, Kenyatta was able to text message her friend, Kristen Price (Price). One of the messages said, "'Help me,'" and included a partial address of the hotel. Price found these text messages to be "a bit alarming." She drove to the location of the partial address, calling police on the way, and met police at the hotel. From the lobby, Price continued texting Kenyatta. At around 7:00 p.m., police arrived at the hotel room door. Shortly thereafter, Kenyatta and defendant came out.

Defense case

Defendant testified on his own behalf. He met Kenyatta at a casino on July 16. At the time, he was on parole for his conviction for raping Tiana. Kenyatta became upset with defendant after he missed her birthday. Still, he saw Kenyatta several times between July 29 and August 21.

On August 20, Kenyatta asked defendant to get a hotel room for her birthday. On August 21, they met at Lucille's Restaurant for lunch. During lunch, Kenyatta again asked defendant to get a hotel room, so defendant searched for one on his phone. After booking the hotel, they drove to it separately.

Defendant arrived 15 minutes before Kenyatta and checked in. When Kenyatta arrived, defendant gave her a room key and told her that he would be right back. He went to his car to get the gift, which was in a bag. When Kenyatta saw the bag, but before she saw what was inside it, she became excited and the two had sex.

Sometime after finishing, the two began getting intimate again. Defendant took a sex toy and lubricant out of the bag. He also showed her a dress and bracelet that he bought for her. Kenyatta, appearing happy, told defendant that he must be "ready for fun" and began using the items. Suddenly, Kenyatta received a phone call from another man. After the call, she told defendant that she had to leave. As she was leaving, she asked about money that he had promised her.[6] At this point, Kenyatta did not have the gift bag with her. Defendant told her that he would give her money some other time. Kenyatta responded, "You think I just did all this for you for nothing?" Defendant believed that she was referring to sex. He asked her if she was a prostitute, which angered her.

Kenyatta turned back into the room and grabbed the gift bag, which also contained some of defendant's belongings. When defendant asked her why she was taking some of his things, Kenyatta responded, "I will show you what prostitutes do." Defendant jumped between her and the door. Kenyatta tried to physically move him and scratch him, but he maintained his position in front of the door. At one point, defendant pushed her

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[6] Defendant had told Kenyatta about money that he had recently won from the casino, and he offered to give her some of the winnings to pay for a tune-up for her car.

away, but he did not choke her. He told Kenyatta that she could leave if she left his stuff.

Kenyatta sat in a chair looking at defendant. The two were silent. After some time, they began to argue. Eventually, police arrived. Kenyatta dropped the bag.

Los Angeles County Sheriff's Deputy Pasquale Mastantuono responded to the incident. He interviewed Kenyatta at the hotel. At that time, she did not say that defendant told her that he would rape her if she refused to have sex with him. Deputy Mastantuono did not see any injuries on Kenyatta and she did not complain of pain. However, she did appear to be in shock. Kenyatta said that defendant had asked her for sex, and when she tried to leave, he blocked her path and put his hand on her throat.

Leneva Cobb, defendant's ex-girlfriend and cohabitant at the time of the incident, retrieved a bag from the police station after defendant's arrest. She gave the bag to a private investigator, who inventoried it. The bag contained defendant's wallet, identification, men's and women's clothing, an A-N-G-L-E bag, receipts, spilled lubricant, a book titled "Dating for Dummies," two bottles of cologne, a silver sex toy, an empty bottle of lubricant, a golden-colored bracelet, a work badge, an empty condom wrapper, and a receipt from Lucille's Restaurant.

Rebuttal

Deputy Mastantuono also interviewed defendant in the hotel hallway. Defendant told Deputy Mastantuono that when he and Kenyatta first went into the room, they kissed and took off their clothes. At that point, defendant went to give her a birthday gift, but she demanded money. Defendant refused to give her money, which upset her. Kenyatta got dressed and was

going to leave, but defendant blocked the doorway because he did not want their relationship to end. Defendant did not mention that they had had consensual sex earlier in the day; he also did not say anything about Kenyatta taking his belongings or assaulting him.

DISCUSSION

I. *The trial court did not infringe on defendant's right to present a defense by refusing to admit an entire 76-page packet of text messages*

Defendant argues that the trial court prejudicially violated his constitutional right to present a complete defense by excluding a 76-page packet of text messages that he exchanged with Kenyatta.

A. Relevant proceedings

Kenyatta had testified at the preliminary hearing that she and defendant went on four dates before they "stopped talking on July 29." While cross-examining her at trial, defense counsel sought to impeach Kenyatta's testimony by establishing that the relationship actually did not end on July 29. Kenyatta then admitted that she and defendant texted often after July 29, with the exception of one week at around the time of her birthday when she left the country. She clarified that those text messages after July 29 were on a friendly—but not romantic—basis.

Defense counsel asked Kenyatta if she had requested to see defendant on August 1, but she could not recall. After defense counsel showed her a screenshot of text messages between her and defendant from August 1, Kenyatta still could not say whether or not she had asked to see defendant on that day.

Noting that Kenyatta had previously testified that she and defendant ended their romantic relationship on July 29, defense

counsel asked to mark as evidence a 76-page packet containing screenshots of text messages between Kenyatta and defendant. The prosecutor objected on relevance grounds.

Outside the jury's presence, the trial court and counsel addressed the admissibility of the text messages. The prosecutor objected on the grounds that the evidence was cumulative and irrelevant in that it appeared to account for the entire text message history of defendant and Kenyatta's relationship. Further, the prosecutor argued that any "explicit details" of her sexual conduct with defendant contained within the text messages were irrelevant and protected under Evidence Code section 1103.

Defense counsel argued that Kenyatta had made it clear that the relationship was only friendly and not romantic after July 29, but the text messages impeached her characterization. As examples of text messages that were inconsistent with her characterization, defense counsel pointed to post-July 29 text messages from Kenyatta to defendant in which she: asked to see him; asked him to go on vacation with her; asked if she would see him on her birthday and then was upset when he did not send her flowers; asked him to go on a harbor cruise; told him that she missed him; on the day before the incident, suggested that they reserve a hotel room together; and, on the day of the incident, suggested that they go to a hotel in Long Beach instead of going to his residence. Moreover, because one of the charges was attempted rape by duress, defense counsel argued that the text messages showed how Kenyatta and defendant communicated with each other and that this was relevant to the issue of duress.

The trial court allowed defense counsel to use any text messages to impeach inconsistent testimony, "if there are any."

However, apparently noting that not all of the text messages were inconsistent with Kenyatta's testimony, the trial court told defense counsel that "all those texts aren't coming in."

Defense counsel then noted that the prosecutor had objected to evidence of prior sexual contact. The trial court noted that Kenyatta had not been asked at the trial, and therefore did not testify, about her sexual relationship with defendant before July 26. The trial court ruled that defense counsel would therefore be allowed to ask about whether she had had sexual contact with defendant before that day, but not delve into the details or text messages describing the prior sexual conduct because "it's just way more prejudicial than it is probative."

Defense counsel resumed cross-examination of Kenyatta. She asked Kenyatta if it was true that, on August 20, Kenyatta had asked defendant to get a hotel room. Kenyatta remembered that she had told defendant that he could not come to her house, so if he wanted to see her, he needed a hotel room. Defense counsel then asked about a text message that Kenyatta had sent to defendant, wherein she told him that he "could very easily get a hotel for us, like I did for you." Kenyatta did not recall saying this. When asked about more messages from the August 20 conversation, Kenyatta still could not recall what she and defendant had discussed. Defense counsel attempted to refresh her recollection with the text messages.

On August 20, defendant sent Kenyatta a text message, asking: "Can you come here or I can come pick you up." Kenyatta responded, "Can we get a hotel . . . somewhere in the middle where we both live." Defendant replied, "I want you here. Just do it for me one time, please, I will make it up to you." Shortly thereafter, Kenyatta asked defendant, "Can we get a

hotel?" Defendant replied, "No. I want you to come over. Do it for me." Kenyatta answered, "I would like a hotel. Do that for me." She then said, "Maybe another time."

The next morning, defendant texted his address to Kenyatta. Shortly thereafter, she sent him a list of hotels in Long Beach. Defense counsel then asked Kenyatta again if she had suggested that she and defendant meet in a hotel, and Kenyatta responded, "Yes."

Defense counsel then sought to impeach Kenyatta's testimony that their post-July 29 communication was "simply friendship calls." Defense counsel went into text messages of a sexual nature, and the prosecutor objected. At sidebar, the trial court reiterated that defense counsel could inquire about text messages that impeached Kenyatta's prior testimony that she and defendant were "just friends" after July 29, but defense counsel had to "pick and choose" her best; in fact, the trial court suggested that rather than going through the entire packet, she pick approximately 10 text messages to highlight.

Resuming cross-examination, defense counsel introduced several text messages between Kenyatta and defendant to both refresh Kenyatta's recollection of the conversations she had had with defendant and to impeach her characterization of their post-July 29 relationship. On July 29, Kenyatta told defendant, via text message, that he had "awakened a beast" in her because she wanted to have sex with him. On August 1, Kenyatta told defendant that she wanted to see him before work. She explained in court that meeting people after work is "what friends do," and that it was not indicative of a romantic relationship. Also on August 1, she asked defendant to take a vacation with her. On August 3, Kenyatta wanted to know if defendant would spend her

birthday with her. On August 4, after defendant missed her birthday, Kenyatta told him that she had "never been treated like that" on her birthday. On August 6, Kenyatta asked defendant if he wanted to go on a harbor cruise with her. On August 7, she asked if she was going to get a birthday present from him. Later that day, she asked defendant if she could come get her gift.

On redirect examination, Kenyatta explained that when she said that she had stopped talking to defendant, she meant that they had stopped dating, not that they had cut off all communication.

B. Legal principles

Only relevant evidence is admissible. (Evid. Code, § 350.) Even if relevant, evidence may be excluded if, in the trial court's discretion, its probative value is substantially outweighed by the probability that the evidence will create undue prejudice or unduly consume time. (Evid. Code, § 352.)

A witness's credibility may be impeached by evidence of a statement that the witness made that is inconsistent with any part of her testimony. (Evid. Code, § 780, subd. (h).) "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with [her] testimony at the hearing and is offered in compliance with [Evidence Code] section 770." (Evid. Code, § 1235.) Evidence Code section 770 provides that extrinsic evidence of an inconsistent statement is only admissible if the witness was given an opportunity to explain or deny the statement and the witness was not excused from giving further testimony.

A trial court "has broad discretion in determining whether to admit impeachment evidence, including whether it is subject to exclusion under [Evidence Code] section 352." (*People v. Turner*

(2017) 13 Cal.App.5th 397, 408.) The admission or exclusion of such evidence is therefore reviewed for abuse of discretion. (*People v. Edwards* (2013) 57 Cal.4th 658, 722.)

"As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's [constitutional] right to present a defense.' [Citations.]" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102–1103.) "Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." (*Ibid.*)

C. The trial court did not err by refusing to admit the entire 76-page packet of text messages between defendant and Kenyatta

Defendant's defense was that Kenyatta was an untruthful witness, specifically regarding her testimony that she and defendant had "stopped talking" after July 29. In defendant's view, the 76-page packet of text messages would show that the relationship extended beyond July 29. But not all of the text messages in the packet had value as impeachment evidence. For example, the packet included hundreds of text messages between July 16 and July 29. None of these messages impeaches Kenyatta's testimony that her romantic relationship with defendant ended after July 29. Thus, the trial court stayed within its broad discretion in excluding the packet as a whole while at the same time allowing defense counsel to introduce any text messages within that packet that had impeachment value. (*People v. Turner*, *supra*, 13 Cal.App.5th at p. 408.)

Defendant argues that the trial court excluded "most" of the packet, which was "disproportionate to the interests served

by [the rules of evidence]." He suggests that the trial "court could have placed certain reasonable limits on those messages," such as ordering them to be prepared in a more concise format. But, initially, the trial court allowed defense counsel to introduce any text messages that impeached Kenyatta's testimony. Once defense counsel began discussing the more inflammatory texts of a sexual nature, the trial court invited defense counsel to pick out 10 of the best messages within the packet to impeach Kenyatta's testimony. This was a reasonable limitation, as defense counsel would be able to show (and in fact did show) that Kenyatta had reached out to defendant throughout August, sent sexually suggestive messages after July 29, asked him to go on a vacation with her, and asked him to get a hotel room on August 21. The probative value of piling on more text messages to prove the same point was trivial, whereas sifting through the 76-page packet would have unduly consumed time and been highly inflammatory given the sexual nature of some of the messages. (*People v. Burgener* (1986) 41 Cal.3d 505, 525, disapproved on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 753.)

Defendant also argues that the text messages within the packet that had no impeachment value were nevertheless relevant to his defense because they would have helped show the context of his relationship with Kenyatta. In his opinion, the events on August 21 "epitomized the confrontational nature of their relationship." He even suggests that Kenyatta falsely testified that defendant "lured her to the motel room and kept her there, against her will, while threatening to harm and/or rape her." Thus, the exclusion of the packet as a whole prevented him from presenting a complete defense.

As pointed out by the People, Kenyatta testified that she went to the hotel willingly—she never suggested that defendant "lured" her there. And to the extent that any of the text messages were inconsistent with her testimony, the trial court specifically allowed defense counsel to present them as impeachment evidence.

Regardless, any probative value that the nonimpeachment messages would have had in helping the jury better understand the events of August 21 was neutralized by the text messages that were already deemed admissible. At the risk of sounding redundant, the text messages that were inconsistent with Kenyatta's testimony were admitted and revealed the nature of the relationship in the weeks leading up to August 21. On the other hand, the proffered evidence was a 76-page packet of text messages that would have consumed a significant amount of time and been inflammatory. Thus, the trial court acted well within its discretion in excluding the texts that lacked impeachment value. (Evid. Code, § 352; *People v. Thuss* (2003) 107 Cal.App.4th 221, 234; *People v. Branch* (2001) 91 Cal.App.4th 274, 286–287.)

Because the trial court did not violate the Evidence Code, it follows that defendant's constitutional rights were not violated. (*People v. Fudge*, *supra*, 7 Cal.4th at p. 1103; *People v. Mincey* (1992) 2 Cal.4th 408, 440.) For that reason, *Fowler v. Sacramento County Sheriff's Dept.* (9th Cir. 2005) 421 F.3d 1027 and *Holley v. Yarborough* (9th Cir. 2009) 568 F.3d 1091, cited by defendant, do not compel a different result.

In any event, even if the trial court had erred in refusing to admit the entire 76-page packet of text messages (which it did not), we would conclude that that error would have been harmless under any standard. (*Chapman v. California* (1967)

386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Defense counsel sufficiently impeached Kenyatta's statement that she and defendant had "stopped talking" on July 29 with the text messages that were admitted into evidence. Additional text messages would not have added anything. Moreover, defense counsel's argument that both the impeachment and nonimpeachment text messages were relevant beyond impeachment was limited to the attempted rape by duress charge. But defendant was acquitted of that charge. Thus, the trial court's order did not affect the jury verdict.

II. *The trial court properly imposed the five-year enhancement (§ 667, subd. (a)(1)) because the conviction in count 4 was a serious felony*

Defendant argues that the trial court erred in imposing the five-year enhancement because his conviction for violation of section 136.1, subdivision (b)(1), should not be considered a serious felony.

"For criminal sentencing purposes in this state, the term 'serious felony' is a term of art. Severe consequences can follow if a criminal offender, presently convicted of a felony, is found to have suffered a prior conviction for a serious felony." (*People v. Warner* (2006) 39 Cal.4th 548, 552.) "If the present conviction is also for a serious felony, 'the offender is subject to a five-year enhancement term to be served consecutively to the regular sentence.' [Citation.]" (*People v. Navarette* (2016) 4 Cal.App.5th 829, 842, fn. omitted.) A serious felony is any of those offenses listed in section 1192.7, subdivision (c). (§ 667, subd. (a)(4).)

Pursuant to *People v. Neely* (2004) 124 Cal.App.4th 1258, 1266 (*Neely*),[7] "all felony violations of . . . section 136.1 are serious felonies." Defendant here was convicted under section 136.1, subdivision (b)(1), which is a wobbler. (*People v. Torres* (2011) 198 Cal.App.4th 1131, 1147.) Thus, we must now determine whether defendant was convicted of a felony or a misdemeanor. "A wobbler offense charged as a felony is regarded as a felony for all purposes until imposition of sentence or judgment. [Citations.] If state prison is imposed, the offense remains a felony; if a misdemeanor sentence is imposed, the offense is thereafter deemed a misdemeanor." (*People v. McElroy* (2005) 126 Cal.App.4th 874, 880.)

Here, defendant was charged with "dissuading a witness from reporting a crime, in violation of . . . section 136.1(b)(1), a *Felony*." (Capitalization omitted; italics added.) Defendant received the two-year middle term in *state prison*. As such, the offense was a felony. Because any felony conviction under section 136.1 is a serious felony (*Neely*, *supra*, 124 Cal.App.4th at p. 1268), the trial court did not err in finding that defendant's current conviction is a serious felony.

In urging us to find that his conviction was not a serious felony, defendant offers several public policy arguments. We reject each in turn.

First, defendant argues that section 136.1, subdivision (b), is not a serious felony because it is a lesser included offense of section 136.1, subdivision (c). We agree (as do the People) that subdivision (b)(1) is a lesser included offense of subdivision (c), but that finding does not preclude subdivision (b) from being a

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7 Defendant's arguments notwithstanding, we conclude that *Neely* was rightly decided.

serious felony. After all, *Neely* recognizes that any felony conviction under section 136.1 is a serious felony. (*Neely*, *supra*, 124 Cal.App.4th at p. 1268.) And the drafters did not intend to preclude lesser included offenses from being serious felonies. Section 1192.7, subdivision (c), which lists serious felonies, contains numerous felonies that are lesser included offenses of other crimes. (See, e.g., § 1192.7, subds. (c)(1) [identifying murder and voluntary manslaughter as serious felonies, and voluntary manslaughter is a lesser included offense of murder; *People v. Breverman* (1998) 19 Cal.4th 142, 189, fn. 4]; (c)(3), (c)(10) & (c)(39) [identifying attempted rape and assault with intent to commit rape as serious felonies, and assault with intent to commit rape is an aggravated form of attempted rape; *People v. Ghent* (1987) 43 Cal.3d 739, 757].)

Second, there is no statutory requirement for serious felonies to include the elements of knowledge, malice, force, or threats of force. The statute even identifies certain drug offenses (§ 1192.7, subd. (c)(24)) as serious felonies despite those crimes not necessarily involving knowledge, malice, force, or threats of force. Regardless, as set forth above, *Neely* holds that all felony convictions under section 136.1 are serious felonies.[8] (*Neely*, *supra*, 124 Cal.App.4th at p. 1268.)

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[8] Defendant's reliance upon *People v. Anaya* (2013) 221 Cal.App.4th 252 and *People v. Lopez* (2012) 208 Cal.App.4th 1049 is misplaced. In both of those cases, the appellate courts evaluated and reversed heightened sentences imposed against defendants for violations of sections 136.1, subdivision (b), and 186.22, subdivision (b)(4). (*People v. Lopez*, *supra*, at p. 1065; *People v. Anaya*, *supra*, at pp. 270–271.) Here, defendant was appropriately sentenced for his conviction of violation of section 136.1, subdivision (b)(1).

Third, the fact that defendant's conviction would have been a misdemeanor under former law, but is now considered a wobbler, indicates that the Legislature wanted to make the sentence harsher for a violation of section 136.1. (See Legis. Counsel's Dig., Sen. Bill No. 940 (1997-1998 Reg. Sess.) [confirming that the Legislature understood that it would be increasing the penalties for an existing crime].)[9] It would be contrary to the Legislature's intent to consider the statute under the older paradigm.

III. *Substantial evidence supports defendant's conviction for felony false imprisonment by violence or menace*

Defendant acknowledges that the evidence was sufficient to support a misdemeanor false imprisonment conviction, but contends that it was insufficient to establish the felony version of the crime, which requires a showing that he used violence or menace to restrain Kenyatta.

Evidence is sufficient to support a criminal verdict when the appellate record reasonably supports a finding of guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318; *People v. Johnson* (1980) 26 Cal.3d 557, 562.) On review, we look at the evidence in the light most favorable to the judgment, and "presume in support of the judgment the existence of every

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[9] We reject defendant's contention that the Legislature only intended to impose a harsher punishment on those who pressured victims and witnesses from testifying in gang-related cases. While the Legislature amended sections 136.1 and 186.22 at the same time, it did not state that the possible increased punishment for a violation of section 136.1 can only be applied in the context of section 186.22.

fact the trier could reasonably deduce from the evidence." (*People v. Lewis* (1990) 50 Cal.3d 262, 277.) The testimony of a single witness is sufficient to support a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

"'Force is an element of both felony and misdemeanor false imprisonment. Misdemeanor false imprisonment becomes a felony only where the force used is greater than that reasonably necessary to effect the restraint. In such circumstances the force is defined as "violence" with the false imprisonment effected by such violence a felony.' [Citation.]" (*People v. Castro* (2006) 138 Cal.App.4th 137, 140.)

Here, defendant restrained Kenyatta's liberty when he ran in front of and blocked the door while she tried to leave. He then latched the door, which was the only exit to the hotel room. Had he used no more force than this, his conduct might only have amounted to misdemeanor false imprisonment. (*People v. Castro*, *supra.* 138 Cal.App.4th at p. 143.) But, Kenyatta testified that he thwarted her attempts to move him from his blocking position by grabbing her throat and pushing her against a wall. He then grabbed her shoulder and pushed her into a chair. This level of force supports the jury finding and verdict.

Relying on his own testimony, defendant asserts that a reasonable juror "should have found" that he did not use excessive force, violence, or menace to keep Kenyatta in the hotel room. We do not reweigh the evidence and decide what a reasonable juror could or should have done. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

IV. *The matter must be remanded for the trial court to exercise its discretion to strike defendant's serious felony enhancement pursuant to SB 1393*

Under the law that existed at the time of defendant's sentencing, trial courts had no authority to strike a prior serious felony conviction in connection with the imposition of a five-year enhancement under section 667, subdivision (a)(1). (§ 1385, subd. (b); *People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045–1047.) SB 1393, effective January 1, 2019, changed the law, now giving judges that discretion.

Pursuant to the direction of the Supreme Court in its order dated December 12, 2018, we vacate the sentence in this case and remand the matter back to the trial court. On remand, the trial court is ordered to exercise its discretion to strike or impose the previously mandatory five-year enhancement under section 667, subdivision (a)(1). (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971–973.)

DISPOSITION

The matter is remanded for resentencing pursuant to section 667, subdivision (a), as amended by SB 1393. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT